In the
Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79-689.

RICHARD JOSEPH GAGNE,
PETITIONER,

v.

LARRY R. MEACHUM,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for Respondent in Opposition.

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Opinions Below.

The opinions of the courts below are reported at 602 F. 2d 471 (1st Cir. 1979); 460 F. Supp. 1213 (D. Mass. 1978); ___ Mass. ___, Mass. Adv. Sh. (1978) 1568, 377 N.E. 2d 919 (1978); 367 Mass. 519, 326 N.E. 2d 907 (1975).

Jurisdiction.

The jurisdiction for the writ of certiorari to the United States Court of Appeals for the First Circuit was properly invoked by the petitioner under 28 U.S.C. § 1254(1).

Questions Presented.

The respondent accepts, as being a substantially correct description of the issues presented, the petitioner's statement of the questions presented, which is found at page 2 of the petitioner's brief.

Constitutional Provision Involved.

United States Constitution, Fourteenth Amendment, § 1: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .."

Statement of the Case.

The respondent accepts, as being substantially correct, the petitioner's statement of the case, which is found at pages 3-7 of the petitioner's brief.

Argument.

I. THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH THE DECISIONS OF THIS COURT IN MULLANEY V. WILBUR, 421 U.S. 684 (1975), AND IN RE WINSHIP, 397 U.S. 358 (1970). THE COURT OF APPEALS DID NOT APPLY INCORRECT FEDERAL STANDARDS IN DETERMINING WHETHER THE TRIAL COURT'S CHARGE UNCONSTITUTIONALLY SHIFTED TO THE PETITIONER THE BURDEN OF PROVING THAT HE ACTED IN SELF-DEFENSE OR UNDER PROVOCATION.

The petitioner first argues that the trial judge's charge unconstitutionally shifted to him the burden of proving that he acted in self-defense or under provocation.

This argument has been carefully considered by, first, the Massachusetts Supreme Judicial Court in *Gagne* v. *Commonwealth*, Mass. Adv. Sh. (1978) 1568, 377 N.E. 2d 919 (1978), second, by the United States District Court for the District of Massachusetts in *Gagne* v. *Meachum*, 460 F. Supp. 1213 (D. Mass. 1978), and, finally, by the United States Court of Appeals in *Gagne* v. *Meachum*, 602 F. 2d 471 (1st Cir. 1979). Each of these courts considered this argument in the light of this Court's holding in *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), and *In re Winship*, 397 U.S. 358 (1970).

Each of these courts separately and independently considered the trial judge's charge to determine whether such charge had shifted the burden of proving that he had acted in self-defense or under provocation to the petitioner, and each concluded that it had not.

The Massachusetts Supreme Judicial Court recognized that such a shift of the burden of persuasion would be constitutionally impermissible, citing *Hankerson* v. *North Carolina*, 432 U.S. 233 (1977), and *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975). *Gagne* v. *Commonwealth*, Mass. Adv. Sh. (1978) at page 1572. It then went on to state at pages 1573 and 1574:

"In this case, on the other hand, nowhere in the charge does the judge expressly place any burden on Gagne to rebut any inference or any presumption, to disprove malice, or to prove justification, excuse, or mitigation. Nor do we see any such burdens placed on Gagne by inference. The judge did not tell the jury that Gagne had the burden to prove or to disprove anything. Repeatedly, the judge defined malice in a variety of words which indicated that malice could be proved only if Gagne's conduct was unaccompanied by 'legal justification or excuse or extenuation,' was 'without mitigation or excuse,' or was 'without justification, excuse or extenuation.' Repeatedly, he also instructed the jury that the burden was on the Commonwealth to prove beyond a reasonable doubt every essential element of the crime charged. One of the essential elements of murder, as he instructed the jury, is malice. As he defined malice as an element of murder, the Commonwealth had the burden of proving beyond a reasonable doubt that Gagne's killing of the victim was intentional and without justification, excuse, or mitigation.

"We view the judge's charge in this respect, examined in its entirety, as falling within language in our *Stokes* opinion describing a constitutionally acceptable charge. 'For example, a jury charge might well be constitutionally sufficient which clearly placed the burden of proving malice beyond a reasonable doubt on the Commonwealth and contained other discussion which, although not referring to the burden of proof as to self-defense and reasonable provocation, adequately defined those factors and established them as negating a finding of malice.' *Commonwealth* v. *Stokes*, *supra* at [Mass. Adv. Sh. (1978) at 620]." (Footnote omitted.)

The United States District Court for the District of Massachusetts also considered the same argument. *Gagne* v. *Meachum*, 460 F. Supp. 1213 (D. Mass. 1978). It first held that the giving or failure to give a jury instruction in the context of the charge as a whole is firmly established. *Gagne* v. *Meachum*, *supra*, at page 1218. It then proceeded to examine the Gagne jury trial in its entirety. *Gagne* v. *Meachum*, *supra*, at pages 1218-1220. It then held at page 1220:

> "The *Gagne* jury charge, viewed in its entirety, shifted to Gagne only *the burden of production* of evidence on the issue of malice. It did not shift to Gagne *the burden of persuasion*. Nothing in *Mullaney* prohibits a state from requiring a defendant to show that there is at least some evidence, whether his or the prosecution's, on factors such as self-defense or heat of passion 'before requiring the prosecution to negate this element by proving the absence of [that factor] beyond a reasonable doubt.' *Mullaney*, *supra*, 421 U.S. at 701-702, n. 28, 95 S. Ct. at 1891 n. 28. *See Hankerson*, *supra*, 432 U.S. 230-231, 97 S. Ct. 2339 (Powell, J., dissenting). *See* n. 12, *supra*." (Emphasis in opinion.)

The petitioner further argues that once a jury issue is generated with respect to mitigation, justification or excuse, whether the issue arises from the prosecution's case or from evidence produced by the defendant, the presumption of malice has to be totally dissipated.

The United States District Court dealt with this argument also. *Gagne* v. *Meachum*, *supra*, at pages 1220-1221. It concluded at page 1221:

> "The SJC found, however, and I agree, that '[t]he defendant's testimony in rebuttal of the inference of malice

was not sufficient to create a reasonable doubt as a matter of law.' *Commonwealth* v. *Gagne*, *supra*, 326 N.E. 2d at 910 (footnote omitted). See *Mullaney*, *supra*, 421 U.S. at 701-702, n. 28, 95 S. Ct. 1881; *Hankerson*, *supra*, 432 U.S. at 237, n. 3, 97 S. Ct. 2339. *See* n. 12, *supra*. Moreover, read fairly, the judge's charge at Gagne's trial did no more than permit the jury to draw rational inferences. In effect, it placed the issue of malice in 'the lap of the fact finder.' Apparently, the jury chose not to believe Gagne's own testimony as to self-defense and provocation."

Finally, the United States Circuit Court for the First Circuit dealt with this argument. *Gagne* v. *Meachum*, 602 F. 2d 471 (1st Cir. 1979). It denied petitioner's request for a writ of habeas corpus for many of the same reasons given by the District Court. *Gagne* v. *Meachum*, *supra*, at page 472. It held, at pages 472-473, as follows:

"Gagne's petition is based on the allegation that the state trial judge unconstitutionally shifted to him the burden of proving that he acted in self-defense or under provocation, in violation of the principle laid down in *Mullaney* v. *Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975), which was given full retroactive effect in *Hankerson* v. *North Carolina*, 432 U.S. 233, 97 S. Ct. 2339, 53 L. Ed. 2d 306 (1977). Like the district court, however, we do not believe that the charge shifted to Gagne the burden of proof on the element of malice.

"The Supreme Court held in *Mullaney* that an instruction that a Maine defendant was required to prove 'by a fair preponderance . . . that he acted in the heat of passion on sudden provocation' in order to reduce a homicide

to manslaughter, 421 U.S. at 686, 95 S. Ct. at 1883, violated the defendant's right to have the requisite degree of malice, as an element of the offense, proven beyond a reasonable doubt by the state. See *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). At Gagne's trial, by contrast, the judge at no time stated that there was any burden on the defendant, nor was there any generally accepted state rule that required a defendant to prove self-defense. The judge stated, with significant repetition, that it was the Commonwealth's burden to prove each element of the offense beyond a reasonable doubt, that malice was an element of murder, that the Commonwealth had to prove malice, and that a killing was done with malice if it was done intentionally and 'without justification, excuse or extenuation.' The judge also defined adequate provocation and self-defense, and stated that a homicide 'may . . . be justified and hence lawful if done in self-defense.' The instruction given conveyed that the Commonwealth had to prove malice beyond a reasonable doubt, and malice was defined to include the concept that Gagne had acted without justification — *i.e.*, not in self-defense. The charge, read as a whole, *Cupp* v. *Naughten*, 414 U.S. 141, 146-47, 94 S. Ct. 396, 38 L. Ed. 2d 368 (1973), did not shift the burden of proof to defendant." (Footnotes omitted.)

II. Mullaney v. Wilbur, 421 U.S. 684 (1975), Should Not be Interpreted to Require an Affirmative Instruction to the Jury that the Prosecution Must Prove Beyond a Reasonable Doubt the Absence of Mitigation or Self-Defense Once those Issues have been Properly Presented in a Homicide Case.

A. *Mullaney v. Wilbur Should Not be Interpreted to Require that an Affirmative Statement be Given to the Jury to the Effect that the Prosecution Must Disprove Mitigation or Self-Defense Once they are Issues in the Case.*

This contention was considered first by the United States District Court in *Gagne* v. *Meachum*, 460 F. Supp. 1213 (D. Mass. 1978). The judge inferentially disposed of this argument by saying at pages 1220-1221:

"Gagne next contends that there was sufficient evidence of self-defense and heat of passion to raise a reasonable doubt with regard to malice and require the inference to be eliminated from the case. He argues that by permitting the inference to remain, the trial judge relieved the Commonwealth of the burden of proving malice beyond a reasonable doubt and required Gagne to prove justification or mitigation. I disagree. Even if the evidence supportive of Gagne's theory of the case was sufficient to rebut a presumption of malice, it did not concomitantly eliminate the permissible inference of malice:

> ". . . although the presumption of a fact may have been dissipated, the permitted inference of that fact is not, thereby, automatically extinguished also. It may, as a survivor, have an independent life of its own. . . . The mere creation of a genuine doubt as to a fact is enough to dissipate the presumption of that fact, but that mere doubt is not enough to foreclose the permitted inference of that fact. The doubt simply places the question in the lap of the fact finder."

This argument was also dealt with by United States Court of Appeals for the First Circuit in *Gagne* v. *Meachum*, 602 F. 2d 471 (1st Cir. 1979), when it said at page 473:

> "To be sure, the court did not tell the jury explicitly that the Commonwealth had to prove absence of self-defense. It was not asked to give such an instruction but, in any event, we do not perceive the natural import of the charge as indicating that the Commonwealth did not have this burden. Petitioner would have us require not only that the burden not be shifted expressly or by implication to a defendant, but that he be deemed entitled, without request and as a matter of constitutional law, to an explanatory statement negativing any possible misapprehension on the part of jurors. We think petitioner asks too much." (Footnote omitted.)

The Circuit Court also distinguished *Sandstrom* v. *Montana*, ____ U.S. ____, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979), cited at page 15 of petitioner's brief, from the present case when it said at pages 473-474:

> "*Cf. Sandstrom* v. *Montana*, ____ U.S. ____, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979) (disapproving instruction that 'the law presumes that a person intends the ordinary consequences of his voluntary acts'). Rather the court said that '*When the fact of malice is shown*,' *i.e.*, when a

homicide is shown to have been done intentionally, without justification or excuse, 'there is nothing to rebut the natural presumption.' (Emphasis added.) As the district court, 460 F. Supp. at 1219-20, and the Massachusetts Supreme Judicial Court, 377 N.E. 2d at 921-23, both found, this simply allowed the jury to make a reasonable inference of malice if it concluded that Gagne had acted intentionally and without justification or mitigation, *i.e.*, intentionally and, for present purposes, not in self-defense. We cannot accept Gagne's position, that the instruction conveyed 'that the law *itself* raises the inference of malice.' It was clear that malice was an element for the Commonwealth to prove beyond a reasonable doubt." (Footnotes omitted.) (Emphasis in opinion.)

B. *The Petitioner was Not Entitled to an Explanatory Statement Concerning the Interrelationships Between the Inference or Presumption of Malice and Contrary Evidence of Mitigation or Justification.*

Petitioner first argues that *Mullaney* v. *Wilbur* is fully retroactive, citing *Hankerson* v. *North Carolina*, 432 U.S. 233 (1977). The United States District Court in *Gagne* v. *Meachum*, 460 F. Supp. 1213 (D. Mass. 1978), recognized at page 1221 that the Supreme Judicial Court of Massachusetts had given retroactive effect to *Mullaney*:

> "Apparently, the SJC recognizes that *Hankerson* requires that *Mullaney* be given full retroactive effect. [Footnote omitted.] As a matter of Massachusetts practice, however, the SJC requires that the Massachusetts courts conduct post-*Mullaney* and especially post-*Rodriguez* trials under a standard even stricter than that imposed by *Mullaney* itself. I know of nothing which prohibits a state from affording its defendants procedural protection greater than that required by the Due Process Clause itself.[16] I therefore reject Gagne's triple-standard argument. [Text of n. 16:] I note in this regard that I believe that the SJC, at least in the context of the case at bar, gave *Mullaney* full retroactive effect in compliance with the *Hankerson* mandate. I also note that policy considerations weigh strongly against requiring a state to apply retroactively its own rule affording greater protection to defendants than the Constitution itself requires."

It does not necessarily follow, however, that the trial judge must explicitly tell the jury that the Commonwealth must prove absence of self-defense, and the United States Circuit Court so held in *Gagne* v. *Meachum*, 602 F. 2d 471, 473 (1st Cir. 1979).

For the reasons stated in the Commonwealth's brief in opposition to the petition for a writ of certiorari under Argument II.A, this Court should not so hold.

Conclusion.

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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